UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA, Plaintiff, and STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency, Plaintiff-Intervenor, v. REILLY TAR AND CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILIP'S INVESTMENT CO., Defendants, and CITY OF ST. LOUIS PARK, Plaintiff-Intervenor, v. REILLY TAR & CHEMICAL CORPORATION, Defendant, and CITY OF HOPKINS, Plaintiff-Intervenor, v. REILLY TAR & CHEMICAL CORPORATION, Defendant.	Civil No. 4-80-469 MEMORANDUM IN SUPPORT OF REILLY TAR & CHEMICAL CORPORATION'S MOTION FOR AN ORDER COMPELLING PRODUCTION OF DOCUMENTS

I. Introduction

During the course of the present litigation, the State of Minnesota ("the State") produced a document entitled "Chronology of Republic Creosote, St. Louis Park, Hennepin County," prepared by the State of Minnesota Pollution Control Agency, Division of Water Quality, dated October 29, 1974. See affidavit of Michael J. Wahoske, dated July 13, 1983. The State also produced a document entitled "Chronology of Republic Creosote Property," prepared by the City of St. Louis Park ("the City") dated October 30, 1974. Id. Both chronologies contain references to and summaries of various other documents, memoranda, and notes.

Pursuant to Federal Rule of Civil Procedure 34, on October 6, 1983 defendant Reilly Tar and Chemical Corporation ("Reilly") requested the State and the City to produce for inspection and copying various documents which were referred to and summarized in the chronologies. Each request for production followed a simple format. The City and the State were each asked to produce documents which were listed on Exhibits A and B attached to each Request for Production. In both Requests, Exhibit A listed documents with their attendant summaries as they appeared in the State's chronology and Exhibit B listed documents with their attendant summaries as they appeared in the City's chronology.

In a response dated November 15, 1983, the State refused to produce various documents on the stated grounds of "attorney-client privilege and work product" either on its own behalf or on behalf of the City. See Response of State of Minnesota to Reilly Tar & Chemical Corporation's Request for Production of Documents, dated October 6, 1983. The State refused to produce the following documents:

(from Appendix A to the Request for Production)

2. Oct. 6, 1972: Memo from R.J. Lindall to G.J. Merritt, Executive Director, MPCA, reviewing situation. R.J. Lindall recommends staff inquire of city as to what plans it has to modify soil conditions to prevent water pollution.

(from Appendix B to the Request for Production)

3. 11/8/71 Memo from McPhee, City Official to Popham, City Attorney - Cost analysis of damage caused by Reilly.

7. 12/2/74 Memo from Popham, City Attorney to Cherches, City Manager - meeting with Asst. Attorney General, Kaul.

9. 1/4/77 Draft Amendment to Stipulation Agreement from City Attorney to File - Amendment to Stipulation Agreement between MPCA and St. Louis Park.

16. 1/16/78 Working Paper or Response to MPCA from "Bill" -- Adverse effects of Highway Construction.

In a response dated November 15, 1983, the City refused to produce various requested documents on the stated grounds that "the document requested is protected against discovery because it is work product and because it is privileged under the attorney-client relationship." See City of St.

Louis Park's Response to Reilly Tar & Chemical Corporation's Request for Production of Documents. The City refused to produce the following documents:[1/]

(from Appendix A to the Request for Production)

7. Jan. 12, 1970: Memo to file by W.G. Popham, City Attorney on Conference held; "trace amount present...no problem yet...can treat this in water system...these findings are at the lower end of comp. for detection..."

10. Feb. 27, 1970: Memo from Wayne Popham, City Attorney, to City Manager; regarding plan of action for Republic Creosote matter.

14. Apr. 6, 1970: MPCA Attorney's Notes; noting that even if phenol tests accurate, geologist doubted ground water could percolate 1000 feet in 30 years - may have come from other source.

17. May 12, 1970: Meeting held between St. Louis Park City Council and Republic Creosote and Reilly Tar and Chemical Staff.

20. July 30, 1970: File notes - Wayne Popham, City Attorney; "State Board Health finds no phenols; PCA will not move on ground water as it stands now if Mellon finds phenols and State Board of Health disputes, standing on their own results, we must anticipate a need to impeach the test results of the Board of Health..."

21. Aug. 24, 1970: MPCA Attorney's Notes; regarding meeting at which possibilities of phenols in wells, testing, soil contamination, etc. discussed.

[1/] With respect to six document requests (requests nos. 21, 22 and 35 from Exhibit A and requests nos. 7, 14 and 15 from Exhibit B), the City responded that, although it did not find such documents after a thorough search, the City would not have produced the documents in question even if the City found them. Reilly does not seek an order compelling the City to produce documents that the City does not have or cannot find. However, with respect to these six requests, Reilly seeks an order compelling the production of responsive documents when and if the City finds them.

22. Aug. 30, 1970: File notes of Wayne Popham; regarding telephone call with Robert Lindall, attorney for MPCA; geologist working on Republic Creosote (Wikre) feels that City wells are too distant and too deep to be contaminated with phenols from Republic Creosote property (copy in attorney's files).

23. Oct. 14, 1970: Memo for file from McPhee; Tibor Kods of MPCA had called suggesting trying to get Republic Creosote to agree to a set of stipulations and avoiding expensive litigation.

26. Jan. 22, 1971: Memo from City Attorney to St. Louis Park staff; asking questions regarding City's possible property damage claims against Reilly Tar and Chemical Company for land owned by the City located directly south of the Reilly property.

27. Mar. 17, 1971: Memo to file by City Attorney; preparation of evidence necessary to know exact nature of claim and whether or not it was relatively insignificant or potentially involved a great deal of damages...soil borings should be done in an area to define scope of saturation...

28. Mar. 25, 1971: Memo to City Manager from City Assessor; specifications to cure the land due to soil pollution unknown at present...need to determine minimum requirements to calculate cost cure.

29. Apr. 20, 1971: Memo to file from City Attorney; "as to nature of damages, it appears that PCA will not require City or any other body to excavate the Creosote saturated soil..."

30. May 4, 1971: Note to file (settlement conference) from City Attorney; "need to confirm fact that saturated soil is not threat to ground water; no affirmative evidence."

32. July 14, 1971: Letter to MPCA Attorney, Lindall from City Attorney; requesting postponing decision on dropping litigation.

34. Sept. 21, 1971: Memo to Grant Merritt from Lindall; reporting on closing of Republic Creosote and requesting verification of closing; requesting staff assistance to dispose of litigation.

35. Nov. 11, 1971: MPCA Attorney notes; discussion regarding

litigation and status of plant.

36. Feb. 5, 1972: Memo to file from Popham; report to City Council re-status "the matter has been reviewed with PCA and they are of the opinion that no soil removal is going to be necessary".

37. Mar. 20, 1972: Memo to City Manager from Popham: "Suit to enforce water and air pollution controls strategy...at present there is no danger to health from water pollution...ground water phenol in excess of standards and approaching point where it could affect potability of public water supply in area...was indicated by 4 tests...State Board of Health, also tested water but unable to establish phenol in water...-Mellon Institute did not find phenols...must be assumed that we do not have a claim for underground water pollution..."

45. Oct. 6, 1972: Memo to Merritt from Lindall: reports status and recommends staff inquire of City as to plans to modify soil conditions to prevent water pollution.

51. June 20, 1973: Letter from City Attorney to City Manager: a copy of a letter from the Special Assistant Attorney General for the MPCA (June 15, 1973) was enclosed stating that the MPCA will not be in a position to dismiss their complaint against Reilly until they have received and reviewed a proposal from the City for eliminating potential pollution hazards at the Republic Creosote site.

53. Dec. 3, 1973: Memo to City Attorney from St. Louis Park Director of Public Works: noting meeting on November 26 of City, OSM, and MPCA staff agreeing that the City had to meet the water quality standards for the storm water run-off for drainage from the Creosote property. In return for the agreement to meet the water quality standards, the MPCA would drop, or suspend its lawsuit on the property. The suspension of this lawsuit would allow the City to then proceed with the public hearings and construction phases of the storm sewer project.

54. Jan. 14, 1974: Memo from City Attorney to City Manager: noting that PCA has put a hold on the proposed stipulation due to the fact of recent ground water tests showing the presence of phenol; suggests meeting of persons involved.

55. Jan. 29, 1974: Memo to MPCA staff from MPCA Attorney: expressing need to be kept informed of Republic Creosote status for final resolution and dismissal and requesting status report.

56. Jan. 31, 1974: Notes of MPCA staff on meeting of January 29, 1974: stating City was told to conduct hydrogeologic study; preliminary plan approval given and hydrogeologic study needed before final approval will be given. City was informed stipulation will be presented including both ground and surface waters.

(From Appendix B to the Request for Production)

3. 11/8/71 Memo from McPhee, City Official to Popham, City Attorney - Cost analysis of damage caused by Reilly.

6. 10/16/73 Memo on meeting from McPhee, City Official - Meeting on Creosote problems.

7. 12/2/74 Memo from Popham, City Attorney to Cherches, City Manager - Meeting with Asst. Attorney General, Kaul.

9. 1/4/77 Draft Amendment to Stipulation Agreement from City Attorney to File - Amendment to Stipulation Agreement between MPCA and St. Louis Park.

14. 1/4/78 Letter from Attorney Popham to City Manager Elwell - Enclosure of Draft Resolution on Water Problem.

15. 1/10/78 Memo from Popham as City Attorney to City Manager Elwell - Dickerson Agreement.

16. 1/16/78 Working Paper or Response to MPCA from "Bill" - Adverse effects of Highway Construction.

Upon review of the above lists, Reilly believes that the objections are not well-founded and that the documents requested should have been produced. Therefore, Reilly respectfully moves for an order compelling production of the requested

documents.[2/] While a Local Rule 4(c) conference has not yet been held, counsel for Reilly, the State and the City have agreed to hold such a conference on these matters in the near future and to submit a Rule 4 statement to the Court before the hearing on this motion.

II. Discussion

The subject matter of this motion is closely related to the that of Reilly's Renewed Motion for an Order Compelling Discovery, dated April 20, 1984, wherein Reilly has moved the Court for an order compelling certain deponents to answer questions regarding the institution and settlement of the State Court lawsuit brought by the City and the State against Reilly in the early 1970's. The deponents have refused to answer these questions on the grounds of attorney-client privilege and work product. Reilly has challenged the assertion of those grounds under the facts of this case in that Renewed Motion to Compel. Not wanting to burden the Court with needlessly repetitive material, Reilly will not here review the general

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2/ Reilly filed a motion to compel production of certain documents on July 14, 1983. That motion has never been heard. The documents at issue in that motion are all included in this motion. Hence, that motion has been subsumed by this motion, and its supporting memorandum is hereby incorporated into this memorandum by reference.

facts or the law discussed in the Revised Memorandum In Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery, dated April 20, 1984 ("Reilly's Revised Memorandum in Support"), as to why the privilege and the doctrine asserted by the City and State as grounds for refusing discovery are inapplicable here. That motion is expected to be heard along with the present one, and Reilly adopts the above memorandum and incorporates it by reference herein.

There are, however, some additional facts surrounding the documents sought in this motion which do merit consideration at this point. First, the contents of all of these allegedly privileged documents have been partially disclosed to Reilly. In addition, other documents concerning the same subject matter as that contained in many of the documents at issue in this motion have been produced. Moreover, the contents of many of these documents have been relied upon by witnesses for the State when making sworn affidavits on the merits to the Court. See Reilly's Revised Memorandum In Support at 21-22. These facts undercut any argument that the documents are still (assuming arguendo that they ever were) privileged.

The contents of the documents in question have twice been divulged to Reilly. Attached to the affidavit of Michael J. Wahoske, dated July 13, 1983, are copies of the chronologies

described above. Each not only describes the existence of various memoranda and notes, but also in fact partially discloses the contents of those memoranda. For example, the State's chronology states as follows:

> October 6, 1972: Memo from R. J. Lindall to G. J. Merritt, Executive Director, MPCA, reviewing situation. R. J. Lindall recommends staff inquire of city as to what plans it has to modify soil conditions to prevent water pollution.

See Page 5 of Appendix A to Affidavit of Michael J. Wahoske.

The City's chronology describes the same memo, as follows:

> October 6, 1972: Memo to Merritt from Lindall: Reports status and recommends staff inquire of city as to plans to modify soil conditions to prevent water pollution.

See Page 11 of Appendix B to Affidavit of Michael J. Wahoske.

In addition, other documents between the same individuals concerning the same subject matter, the 1970 lawsuit, have already been disclosed to Reilly. Reilly Tar & Chemical Corporation Deposition Exhibit No. 20 ("RTC ex."), like the October 6, 1972 document discussed above, is a memorandum from Robert J. Lindall, Special Assistant Attorney General, to Grant J. Merritt, MPCA Executive Director. (A copy of RTC ex. 20 is attached to the affidavit of Michael J. Wahoske as Exhibit C). It discusses Mr. Lindall's understandings concerning the litigation, and gives his assessments and recommendations. See also RTC ex. 113 (which includes a handwritten note from Lindall to Merritt).[3/] These disclosures also waive

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[3/] Copies of RTC ex. 20 and part of 113 are attached to Affidavit of Michael J. Wahoske as Appendix C.

any privilege for other communications relating to the same matter. See United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); see also Reilly's Revised Memorandum in Support at 56-57.

Despite the two disclosures of the contents of the allegedly privileged October 6, 1972 document and despite the waiver of the privilege for other communications relating to the same subject matter, both the City and the State refused to produce this document when requested to do so. The State objected to producing this document on the grounds that it was protected by the attorney-client privilege and the work product doctrine. See Response of the State of Minnesota to Reilly Tar & Chemical Corporation's Request for Production of Documents, dated October 6, 1983 at 2. The City, deferring to and concurring with the State, refused as well. See City of St. Louis Park's Response to Reilly Tar & Chemical Corporation's Request for Production of Documents, at 15. However, these objections, and the objections to the requests for the other documents at issue in this motion, are ill-founded, and the Court should order their production. A brief review of the elements of the legal theories underlying the objections demonstrates that these documents should not be protected from discovery.

As a starting point, there is no question that these

documents are relevant under Fed. R. Civ. P. 26 to key issues in the present litigation. The tenacity with which the City and the State are now objecting to their production bears eloquent testimony to the relevance of the documents. The documents concern the scope of the settlement, the meaning of the hold harmless agreement, and the intentions and expectations of the State before and after the settlement. Judge Magnuson's interlocutory ruling on Reilly's Second Affirmative Defense - the question of whether the 1970 lawsuit had been settled - does not foreclose Reilly's inquiry into this area. See Reilly's Revised Memorandum In Support at 29-32.

The claim of the City and the State that these documents are protected by the attorney-client privilege is specious. In order to fall within the privilege, a document must have been written by a client and directed to the sole attention of his or her lawyer with the understanding that the matters discussed in the document would not be divulged to others. See United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). The attorney-client privilege does not apply to the documents at issue in this motion because (a) these documents were for the most part written by attorneys, not their clients,[4/] or (b) most of the documents that were

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[4/] Of the thirty-one documents at issue in this motion (the six documents which the State refuses to produce are all included in the the thirty-one documents which the City refuses to produce), twenty-three were written by an attorney.

written by clients - i.e. administrators for either the State or the City - were not directed to counsel,[5/] or (c) the documents, as intimated by the summaries and paraphrases in the chronologies, do not ostensibly contain information that reflects or discloses a confidential communication from a client, or (d) whatever privilege that might have existed has been waived either by disclosure on the part of the City and the State or by the placing of the matters discussed in the documents into issue in this litigation. See generally Reilly's Revised Memorandum In Support at 32-36, 42-57. The close analysis of the prerequisites of the privilege demonstrates that it does not apply to these documents. However, if one steps away from the din and clamor of this litigation, the fallacies of the State's and the City's objections become even more readily apparent. The documents in question were kept confidential only with respect to Reilly. As to all others, the documents were accessible. Moreover, as the "inadvertent" disclosures of other documents attest, there were no precautions taken to keep these "privileged" documents confidential. In the absence of such basic indicia of the privilege as confidentiality and safety precautions, the documents are not privileged on

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[5/] Of the eight documents not written by an attorney, only two were addressed to an attorney. See request no. 53 from Exhibit A and request no. 3 of the Request to the City.

their face and the State and the City have the burden of demonstrating otherwise. See United States v. Covington & Burling, 430 F. Supp. 1117, 1122 (D.D.C. 1977).

Turning to the work product objections, Reilly submits that few, if any, of the documents can be described as "work product" because few, if any, relate to the trial strategies or theories of the lawyers for the City or State. The mere fact that the documents were written by lawyers for the City or the State is not controlling. Moreover, even if they are work product, they are not immunized from discovery. If, as here, a party can show both that it has a substantial need for the materials and that there is no other source from which it can obtain the information sought, work product materials must be produced. See Reilly's Revised Memorandum In Support at 36-41.

The great concern that courts have about work product is that they do not want to see an attorney for one party prepare his or her case simply by using discovery devices to get the research, notes, and preparation materials arduously compiled by counsel for the opposing party. There is no need for such concern here. If the documents at issue here dealt with the research and thoughts of the attorneys for the State and the City about the Resource Conversation and Recovery Act of 1976 ("RCRA") or the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") and the

novel remedies those statutes provide, this would be a different matter. However, at the time all but four of the documents that are being sought in this motion were written, RCRA did not even exist. CERCLA was not passed until after all of the documents were written.

Reilly is not trying to pry into the legal research files of its adversary, nor is Reilly trying to abuse the discovery process. Rather, Reilly is trying to develop the record on the issues of the scope of the settlement, the scope and meaning of the hold-harmless agreement, and the State's understanding of the settlement. See Reilly's Revised Memorandum in Support at 10-15. At this point, the writings of the lawyers on those issues are no more protected than would be a corporate executive's notes and memoranda concerning a contract if the terms and scope of that contract were at issue in litigation. Since Reilly has a "substantial need" for the information in these documents and since this information is obtainable from no other source, Reilly has met its burden of showing "good cause" as to why these documents should be produced. See Fed. R. Civ. P. 26(b)(3).

III. Conclusion

For all of the foregoing reasons, and for the reasons set forth in Reilly's Revised Memorandum In Support, this Motion to Compel Production of Documents should be granted, and Reilly should be awarded the expenses and attorneys' fees to which it is entitled under Federal Rule of Civil Procedure 37. As an alternative and at a minimum, the Court should order that the documents inquestion be submitted to the Court for an in camera inspection of the documents in order to see whether the asserted attorney-client privilege and work product doctrine are applicable.

Dated:

Respectfully submitted,

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